No. 84-38

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

PEOPLE OF THE STATE OF ILLINOIS and PEOPLE OF THE STATE OF MICHIGAN, *Petitioners,*

v.

CITY OF MILWAUKEE, et al., *Respondents.*

PEOPLE OF THE STATE OF ILLINOIS and the METROPOLITAN SANITARY DISTRICT OF GREATER CHICAGO, *Petitioners,*

v.

THE SANITARY DISTRICT OF HAMMOND, et al., *Respondents.*

REPLY OF PETITIONERS TO RESPONDENTS' BRIEFS IN OPPOSITION AND TO THE *AMICUS* BRIEF OF THE UNITED STATES

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Petitioners, the People of the State of Illinois, the People of the State of Michigan, and the Metropolitan Sanitary District of Greater Chicago, submit this brief in reply to the two briefs in opposition filed by respondents and to the *amicus* brief recently filed by the United States. Petitioners pray that the Court grant the petition for *certiorari*.

ARGUMENT

The briefs of respondents in opposition and the *amicus* brief of the United States concede, as they must, that nothing in *Milwaukee I*, *Milwaukee II* or the CWA precludes the application of *some* State's law. Hammond Brief at 15-16; Milwaukee Brief at 9-10; U.S. Brief at 13-14 & n.12. Though they acknowledge that Wisconsin law may be applied in *Milwaukee* and Indiana law may be applied in *Hammond*, they maintain that Illinois law cannot be applied in either case. Why this is so is never really explained, at least not in a manner consistent with *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), and the scores of decisions of this Court that make clear there are no *constitutional* restraints on choice of law precluding application of Illinois law in these cases. *E.g.*, *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981).

I

NEITHER *MILWAUKEE I*, *MILWAUKEE II*, NOR THE CWA PRECLUDES THE APPLICATION OF ILLINOIS LAW

Milwaukee I certainly does not hold that Wisconsin law could be applied but Illinois law could not. Rather, it held that federal common law would be applied in lieu of *any* State's law. Now, of course, federal common law does not exist. *Milwaukee II*. If it does not exist, it surely cannot continue to preempt *any* State's law.[1] *E.g.*, *Sturges v. Crowinshield*, 4 Wheat (17 U.S.) 122, 196 (1819).

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[1] If unspecified "federal interests" having no identifiable textual source in the Constitution or laws of the United States continue to preempt state law notwithstanding the demise of federal common law, U.S. Brief at 9, no one could ever recover damages resulting from pollution of the "interstate or navigable" waters

(Footnote continued on following page)

Milwaukee II certainly does not hold that Wisconsin law could be applied but Illinois law could not. This Court expressly left open the question of the availability of state law remedies supplementary to the CWA. 451 U.S. at 310 n.4, 327-28. That such remedies exist and are available is not in doubt. The Congress of the United States has said they are. 33 U.S.C. §§ 1365(e), 1370. This Court has said they are. *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 16 n.26 (1981).

The CWA itself certainly does not say that Wisconsin law could be applied but Illinois law could not. Rather, Congress says "*any* State" may "adopt or enforce" not only a more stringent "standard or limitation respecting discharges" but also "*any* requirement respecting control or abatement of pollution." 33 U.S.C. § 1370 (emphasis added). *Any* State may adopt or enforce *any* abatement or control requirement. "Any" State cannot mean Wisconsin but not Illinois. Congress also says that the statutory remedies it made available in § 505 do not preempt resort to "*any* other relief" available under "*any* statute or common law." 33 U.S.C. § 1365(e) (emphasis added). "Any" relief cannot mean damages but not injunctive relief.[2]

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[1] *continued*
of the United States under *any* State's law, whether the pollution is of intrastate or interstate origin. *Milwaukee I*, 406 U.S. at 102. *See also People of the State of Illinois v. Outboard Marine Corp.*, 619 F.2d 623, 627 n.14 (7th Cir. 1980), *vacated and remanded*, 453 U.S. 917 (1981), *on remand*, 680 F.2d 473, 479 n.9 (7th Cir. 1982). This, of course, would be inconsistent with Congress's explicit intent in enacting the CWA, which affords no damages remedy. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 16 n.26 (1981).

[2] The suggestion of the United States that this petition presents no question regarding the availability of damages is, quite simply, untrue. U.S. Brief at 12 n.10. The *Hammond* complaint seeks damages in addition to equitable relief. Hammond Brief at 3. Moreover, the question whether a cause of action exists at state

(Footnote continued on following page)

And, "any" statute or common law cannot mean the statutes or common law of Wisconsin but not of Illinois.

II

PETITIONERS SHOULD BE PERMITTED TO PROCEED UNDER THE GOVERNING STATE LAW, WHATEVER IT MAY BE

Though much of the briefs of respondents and the United States are devoted to drawing from *Milwaukee I, Milwaukee II* and the CWA the proposition that federal law governs, the ultimate conclusion reached by the Court of Appeals and acknowledged by respondents and the United States is that federal law does not govern, state law governs: Wisconsin law governs in *Milwaukee*; Indiana law governs in *Hammond.*

If—after all the talk about *Milwaukee I, Milwaukee II,* and the CWA—*state law* governs, then the mandates of *Erie* and *Klaxon* must apply. Even assuming, *arguendo,* that Wisconsin law governs in *Milwaukee,* the Court of Appeals surely must apply it. If Indiana law governs in *Hammond,* the Court of Appeals surely must direct its application on remand, including *Indiana* choice-of-law rules that unquestionably would compel even an *Indiana* court to apply *Illinois* substantive law. *E.g., Snow v. Byrne,* 449 N.E.2d 296, 298 (Ind.App. 1983); *Maroon v. State Dept. of Mental Health,* 411 N.E.2d 404 (Ind.App. 1980).

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[2] *continued*
law is analytically distinct from the question of what relief is appropriate. *Davis v. Passman,* 442 U.S. 228, 239 (1980); *City of Evansville v. Kentucky Liquid Recycling, Inc.,* 604 F.2d 1008, 1019 & nn.32-34 (7th Cir. 1979), *cert. denied,* 444 U.S. 1025 (1980). It is also analytically distinct from the questions of which State's law applies or where suit may be brought. *E.g., Allstate Ins. Co. v. Hague,* 449 U.S. 302, 307-08 (1981).

When, as in *Milwaukee*, there is *no conflict* between the law of Illinois and the law of Wisconsin on whether compliance with a regulatory scheme constitutes a defense to a public nuisance action[3] and precious little, if any, difference between the Illinois common law of nuisance and the Wisconsin common law of nuisance, *Milwaukee* (*7th Cir.*), 599 F.2d at 163 n.21, it makes no sense that petitioners have been thrown out of a properly venued *federal* court having personal and subject matter jurisdiction without a decision on the merits under whatever body of law is applicable. The People of Illinois did *exactly what this Court told them to do* when they first applied to this Court for relief, went through 14 years of litigation, and proved the factual allegations of their *Milwaukee* complaint—the nucleus of operative fact that constitutes the "case." *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307-08 (1981). Petitioners are entitled to a decision on the merits of that case, whatever may be the law which governs it.

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[3] The suggestion of the United States that permitting a suit under state law to abate an in-State nuisance or trespass having out-of-State origins would "undermine" the policies, purposes and objectives of Congress, U.S. Brief at 10-11, is specious. The *purpose* of the Act is to *eliminate* the pollution of our waters, not to license their pollution or to immunize the polluters from the reach of *any* State's law. 33 U.S.C. § 1251(a)(1). As *Congress* made crystal clear in § 510(1), 33 U.S.C. § 1370(1), requiring a polluter to do *more* than required by the CWA in no way "interferes" with achievement of that purpose. *How* does abatement of a nuisance-creating discharge "frustrate" the purposes and objectives of Congress? If it is *the act of abating* a nuisance-creating discharge that *constitutes* "interference" with the Congressional scheme, it is surely specious to say that, though there is no interference when the abatement is ordered by a Wisconsin court under Wisconsin nuisance law, *Milwaukee II*, 451 U.S. at 328 (States "may adopt more stringent limitations through . . . state nuisance laws, and apply them to in-state dischargers"), a *federal* court's abatement order, whether based on the nuisance law of *either* Wisconsin *or* Illinois, would somehow "interfere" with the federal scheme.

And they are also entitled to litigate the allegations of their *Hammond* complaint, whatever may be the law which governs that case.

There is neither reason nor authority for the assumption which underlies the judgments of dismissal of the Court of Appeals and the briefs in opposition—that only the State whose law applies can provide a forum for its application. Surely a federal court, which is *duty-bound* to decide cases and controversies properly brought before it, is empowered to apply the law of any State which it deems applicable, whether it be the law of Wisconsin, Indiana or Illinois.

Which State's law now applies is, of course, a choice-of-law matter, the resolution of which is not controlled by the litigants or the pleadings. But, given the time, money and effort that has gone into prosecution of these cases, particularly *Milwaukee,* can the refusal of a federal court to apply the law that it has declared applicable honestly be dismissed as an inconsequential "procedural ruling" which "presents no issue warranting the attention of this Court"? U.S. Brief at 14.

III

THERE IS A CONFLICT WHICH MUST BE RESOLVED BY THIS COURT

The questions presented by this petition will not go away. Every time a hard rain falls on Milwaukee, millions of gallons of untreated and inadequately treated sewage are flushed from the Milwaukee sewers into Lake Michigan and ultimately carried into Illinois territorial waters from which millions of Illinois citizens draw their drinking water. A nuisance *remains* a nuisance until it is abated. And, notwithstanding the "comprehensive federal scheme,"

U.S. Brief at 10, the simple truth is that Chicago beaches were littered by raw sewage in 1980 and somebody had to pay to clean up the mess.[4]

Despite the efforts to convince this Court otherwise, state law *exists* and cannot be either *repealed* or *revived* by any act of any branch of the federal government. State common law preexisted the Constitution and laws of the United States. It's part of the *genius* of "Our Federalism," *Younger v. Harris*, 401 U.S. 37, 44 (1971), that the common law is always there. And, there are courts that will apply and enforce it unless a supervening body of *existing* federal law preempts its application. The CWA does not.

The Seventh Circuit's ruling is in square conflict with the ruling of the Illinois Appellate Court, which has held that the CWA does not preempt the application of Illinois law to in-State nuisances that have out-of-State origins. *People ex rel. Scott v. United States Steel Corp.*, 40 Ill.App.3d 607, 352 N.E.2d 225 (1st Dist. 1976); *Metropolitan Sanitary District v. United States Steel Corp.*, 30 Ill.App.3d 360, 332 N.E.2d 426 (1st Dist.), *cert. denied*, 424 U.S. 976 (1975). Though the United States may wish

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[4] The suggestion of the United States that there is any "question" regarding the availability of damages at state law, U.S. Brief at 12 n.10, is specious in the face of Congress's explicitly stated intent on the matter. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 16 n.26 (1981). Despite Congress's contrary intent, the United States urges this Court to follow the reasoning of a district court, U.S. Brief at 9-10, whose judgment of dismissal has foreclosed the Chicago Park District from recovering damages for the clean-up costs it incurred in removing Hammond's sewage from Chicago beaches. *Chicago Park District v. Sanitary District of Hammond*, 530 F.Supp. 291 (N.D. Ill. 1981), *appeal pending*, No. 81-2696 (7th Cir.).

it were otherwise, U.S. Brief at 6 n.6, state trial courts must follow the precedents of state appellate courts when they are in conflict with the precedents of any federal court other than this Court.

The Illinois Appellate Court may not have had "the benefit" of the Seventh Circuit's views in this case when the state court precedents that the United States dismisses in a footnote were handed down. U.S. Brief at 6 n.6. But Judge Kilcrease of the Chancery Court of Davidson County, Tennessee did when the People of Tennessee brought suit to stop a Champion International papermill from defiling the Pigeon River. He "respectfully differs with the Seventh Circuit on the question of whether Congress, through the Clean Water Act, 33 U.S.C. § 1251, intended to preempt state law" and, like the judges of the Illinois Appellate Court before him, ruled that the "purpose of the Clean Water Act was to create an additional remedy to the urgent national problem of water pollution, not to destroy those remedies already in existence." *State of Tennessee v. Champion International Corp.*, No. 83-1149-I (Chan. Ct., Davidson County, Tenn.), App. B at A-4, Brief of the States of Tennessee and Oklahoma as Amici Curiae, *appeal pending*, No. 84-303-II (Tenn. App.).

The questions presented by this petition are serious, substantial and worthy of this Court's attention. There is only one federal court which can tell Judge Kilcrease, and the scores of other state and federal court judges who inevitably will be faced with the very same questions, how to answer them.

CONCLUSION

The Court should grant the petition for *certiorari*.

Respectfully submitted,

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